

FCC MAIL SECTION

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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DA 95-1363

In the Matters of)

UACC Midwest, Inc. d/b/a)

United Artists Cable Mississippi Gulf Coast;)

Telecable Associates, Incorporated;)

Vicksburg Video, Inc.;)

Mississippi Cablevision, Inc.; and)

Mississippi Cable Television Association,)

Complainants)

v.)

South Central Bell Telephone Company,)

Respondent)

CC Docket No. 95-94

PA 91-0005 through
PA 91-0009

HEARING DESIGNATION ORDER

Adopted: June 15, 1995

Released: June 15, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we designate for hearing consolidated pole attachment complaints filed by UACC Midwest, Inc., d/b/a United Artists Cable Mississippi Gulf Coast (United Artists), Telecable Associates, Incorporated (Telecable), Vicksburg Video, Inc. (Vicksburg), Mississippi Cablevision, Inc. (Cablevision), and Mississippi Cable Television Association (MCTA) (collectively, Complainants) against South Central Bell Telephone Company (South Central Bell). The complaints concern the pole attachment rates South Central Bell has charged Complainants since the

complaints were filed in 1991.¹ To expedite the resolution of these complaints, we direct the presiding administrative law judge (ALJ) to require the parties to meet prior to the hearing to determine whether the cases can be settled. In the event settlements are not reached, the presiding judge will, if possible, resolve the cases on a paper record, but, if unable to do so, shall conduct such further proceedings as may be necessary.

II. BACKGROUND

A. Statutory and Rule Requirements

2. Pole attachments refer to the placement of cable operator equipment on utility poles owned or controlled by telephone or electric companies. The utility can charge the cable operator for the attachment of its facilities to the utility's poles. Section 224 of the Communications Act of 1934, as amended,² empowers the Federal Communications Commission to adjudicate disputes between cable system operators and telephone companies concerning allegedly unjust and unreasonable pole attachment rates that no state regulates. In enacting Section 224, Congress specified that each pole attachment rate should be deemed just and reasonable if it:

assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole....³

This statutory language defines a zone of reasonableness for pole attachment rates that extends from the telephone company's incremental costs to the cable operator's share of the telephone company's fully allocated costs. Incremental costs consist of those costs that the telephone company would not have incurred "but for" cable attachments.⁴ Fully allocated costs refer to the operating expenses and capital costs of owning and maintaining poles. These costs include depreciation, taxes,

¹ The filing dates are: United Artists - September 10, 1991; Telecable - October 2, 1991; Vicksburg - October 1, 1991; Cablevision - October 24, 1991; and MCTA - November 19, 1991. MCTA amended its complaint to add additional cable operators on November 25, 1991, March 16, 1992, and February 8, 1993.

² 47 U.S.C. §224.

³ 47 U.S.C. §224(d)(1).

⁴ S. Rep. No. 95-580, 95th Cong., 1st Sess. 19 (1977).

administrative expenses, maintenance expenses, and a return on investment.⁵

3. Based on the statutory language contained in Section 224 and the legislative history, the Commission adopted Section 1.1409(c) of its rules.⁶ This section translates the upper bound of the zone of reasonableness defined by Congress into the following formula:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times (\text{Operating Expenses} + \text{Capital Cost of Poles})$$

4. We generally calculate the sum of operating expenses and capital cost of poles by multiplying the net cost of a bare pole times the carrying charges, so that the formula defining the upper bound of the zone of reasonableness becomes:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charges}^7$$

For telephone companies, the net cost of a bare pole equals 95 percent of the net investment per pole, as indicated by the following formula:

$$\text{Net Cost of a Bare Pole}^8 = \frac{\text{Gross Pole Investment} - \text{Depreciation Reserve (Poles)} - 5\% \text{ Net Pole Investment}}{\text{Number of Poles}}$$

Carrying charges refer to costs incurred by the utility in owning and maintaining poles regardless of the presence of cable attachments. They include the utility's income tax, pole maintenance, administrative, and depreciation expenses, as well as a return on pole-related investment at the authorized intrastate rate of return. We express the carrying charges as a percentage that we calculate using formulas that are set forth in Attachment A.

5. In the *Pole Attachment Order*, the Commission listed the regulatory accounts to be used, where possible, in applying the formulas to determine the maximum allowable rate for pole attachments. For telephone companies, the accounts the Commission listed were in its then existing uniform accounting system for

⁵ *Id.* at 19-20.

⁶ 47 C.F.R. §1.1409(c).

⁷ See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, *Report and Order*, 2 FCC Rcd 4387, 4388, para. 6 (1987) (*Pole Attachment Order*), *recon.*, 4 FCC Rcd 468 (1989).

⁸ *Pole Attachment Order*, 2 FCC Rcd at 4403, Appendix A.

telephone companies.⁹ Effective January 1, 1988, the Commission replaced that accounting system with a new system that changed how telephone companies account for their costs, including those used in applying the pole attachment formulas.¹⁰ In a June 22, 1990 letter to Complainants' counsel, the Common Carrier Bureau's Accounting and Audits Division (Division) provided guidance on how to apply the formulas using Part 32 accounts.¹¹ That letter indicates where expenses recorded previously under Part 31 were required to be recorded under Part 32.¹²

B. The Pleadings

6. In their complaints, Complainants state that they own and operate cable television systems serving several Mississippi communities.¹³ Complainants also state that they have entered into pole attachment agreements with South Central Bell, that South Central Bell has made space available on the poles to them pursuant to those agreements, and that they pay South Central Bell an annual rental fee of \$6.55 or \$6.56 for each pole attachment.¹⁴ Using information provided by South Central Bell and applying the Commission's pole attachment formulas, Complainants calculate that the maximum just and reasonable rate for their pole attachments is \$4.54 per year.¹⁵ Complainants urge the Commission to substitute this lower rate for the \$6.55 or \$6.56 rates contained in their agreements, and to order refunds with interest on any payments in excess of the \$4.54 rate.¹⁶ Complainants also state that they attempted to negotiate a reduction in their rate with South Central Bell, but that the differences between the parties did not appear susceptible to settlement.¹⁷

7. In response to the complaints, South Central Bell provides

⁹ 47 C.F.R. Part 31 (1987).

¹⁰ 47 C.F.R. Part 32. Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and B Telephone Companies, 51 Fed. Reg. 24745 (July 8, 1986) (*Part 32 Order*) & 51 Fed. Reg. 43493 (Dec. 2, 1986); *recon. in part*, 2 FCC Rcd 1086 (1987).

¹¹ Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (1990) (*June 22 Letter*).

¹² *Id.* at 3898-99.

¹³ *E.g.*, United Artists Complaint at 1.

¹⁴ *E.g.*, *id.* at 3 & 5.

¹⁵ *E.g.*, *id.* at 5.

¹⁶ *E.g.*, *id.* at 6.

¹⁷ *E.g.*, *id.*

calculations that, in its view, show that the maximum just and reasonable pole attachment rate for Complainants' cable systems is \$6.64.¹⁸ South Central Bell denies that the *June 22 Letter* correctly maps the conversion from Part 31 to Part 32, and argues that Complainants have miscalculated the maintenance and administrative expenses components of the overall pole attachment formulas.¹⁹ We address these arguments below.

III. SUBSTANTIVE MATTERS

A. Maintenance Expenses

1. Parties' Positions

8. The Complainants and South Central Bell disagree with regard to the computation of the maintenance component of the carrying charges.²⁰ Under Part 31, telephone companies used Account 602:1, Repairs of pole lines, to record pole expenses.²¹ Under Part 32, the companies use Account 6411, Poles expense, to record those costs.²² The Complainants contend that only the portion of Account 6411 that corresponds to what was previously recorded in Account 602:1 may be included in the numerator of the maintenance calculation, and that Account 6411 includes benefits and rental expenses that South Central Bell would not have recorded in Account 602:1.²³ South Central Bell asserts that Account 6411 must be reflected in its entirety in the calculation of the maintenance component of the carrying charges. South Central Bell, therefore, makes no adjustments for items recorded in Account 6411 that would not have been recorded in Account 602:1.²⁴

2. Discussion

9. Part 32 and former Part 31 can be reconciled by isolating the differences in the manner of recording expenses under both systems. Account 6411 of Part 32 is comparable to Account 602:1 of Part 31, if the benefits and rents

¹⁸ South Central Bell Response at 3.

¹⁹ *Id.* at 2-4.

²⁰ *E.g.*, United Artists Complaint at 3-4.

²¹ 47 C.F.R. §31.602:1 (1987).

²² 47 C.F.R. §32.6411.

²³ *Id.*

²⁴ See South Central Bell Responses at 2-3.

components of Account 6411 are eliminated.

10. In adopting Part 32, the Commission intended to provide a more flexible, more informative accounting system.²⁵ The Commission did not intend to change the data we would use in calculating the maintenance component of the pole attachment rates.

11. In the *June 22 Letter*, the Division mapped the conversion from Part 31 to Part 32 with respect to the calculation of the maintenance component of the carrying charges by excluding benefits and rents that would not have been recorded in Account 602:1. Because excluding these items provides a calculation of the maintenance component that comports with the prior calculation under Part 31, we find that Complainants correctly excluded these items from their maintenance carrying charge calculation.

B. Administrative Expenses

1. Parties' Positions

12. Complainants and South Central Bell also disagree with respect to the computation of the administrative component of the carrying charges.²⁶ Under Part 31, telephone companies used Accounts 661 through 665 and 668 through 677 to record general and administrative expenses.²⁷ Under Part 32, the companies use a variety of accounts to record those costs.²⁸ The Complainants contend that amounts recorded in Account 6535, Engineering expense, Account 6124, General computer expenses, and Account 6231, Radio systems expense, should not be included in the numerator of the administrative component calculation.²⁹

13. South Central Bell states that the Commission's rules do not require any portion of Account 6535 to be removed from the computation of the

²⁵ *Part 32 Order*, supra note 10, slip op. at 24745.

²⁶ *E.g.*, United Artists Complaint at 4.

²⁷ 47 C.F.R. §§31.661-.665, 31.668-.677 (1987).

²⁸ Among the relevant Part 32 accounts are the accounts that are summarized by accounts of 6710, Executive and planning and 6720, General and administrative. In addition, other relevant Part 32 accounts are Account 6124, General purpose computers expense and 6231, Radio systems expense.

²⁹ *E.g.*, United Artists Complaint at 4; see also Complainants Consolidated Reply at 4-6.

administrative component.³⁰ South Central Bell also indicates by its calculations that the amounts in Accounts 6124 and 6231 should be included in the development of the administrative factor.³¹ Alternatively, South Central Bell argues that the numerator of the administrative factor should reflect any benefits or rents excluded from the maintenance factor computation.³²

2. Discussion

14. For the administrative component calculation, we must follow the same logic we applied to our discussion of the maintenance component. Our conclusion leads us to a methodology that attempts to equate our calculations under Part 32 with those under Part 31.

15. We determined above that benefits and rents items recorded in Account 6411 must be excluded from the numerator of the maintenance component calculation in order to conform that calculation to those under Part 31.³³ While these items were not included in the numerator of the maintenance component calculation under Part 31, they were included in the numerator of the administrative component calculation.³⁴ Under Part 31, telephone companies recorded benefits and rents relating to poles in Accounts 672, Relief and pensions, and 671, Operating rents, respectively.³⁵ In the *Pole Attachment Order*, the Commission determined that administrative component calculations should reflect all amounts recorded in these accounts.³⁶ As a result, we believe that the numerator of the administrative component calculation must continue to include these items. We, thus, agree with South Central Bell's alternative assertion with respect to benefits and rents.

16. Another point of contention between the parties is that South Central Bell includes Account 6231, Radio systems expense, in the numerator of the calculation of the administrative component. Account 6231 is used to record satellite and earth station facilities expenses. The Commission determined that administrative

³⁰ South Central Bell Response at 3-4.

³¹ *Id.*

³² *Id.*

³³ See *supra* Part III.A.2.

³⁴ See *Pole Attachment Order*, 2 FCC Rcd at 4400-4, Appendices A & B; see also *June 22 Letter*, *supra* note 11 at 3898.

³⁵ 47 C.F.R. §§31.671-.672 (1987).

³⁶ *Pole Attachment Order*, *supra* note 34, Appendix B at 4404.

component calculations should reflect those expenses.³⁷ Account 6231 also includes other radio facilities expenses that should not be included in the administrative component calculation.³⁸ We, thus, conclude that of amounts recorded in Account 6231, only earth station facilities expenses should be included in the numerator of the administrative component calculation.

17. Complainants also raise an issue concerning the inclusion of all of Account 6535, Engineering expense, in the numerator of the administrative component calculation. Account 6535 is intended to be used to record general engineering expenses that are not directly chargeable to specific undertakings or projects.³⁹ According to the *June 22 Letter*, a portion of Account 6535 would include expenses that under Part 31 would have been recorded in Account 675 or cleared to Account 602:1.⁴⁰ Because the Commission determined that administrative component calculations should reflect all amounts recorded in Account 675,⁴¹ we agree with Complainants' position that a portion of Account 6535 should be included in the numerator of the calculation of the administrative component. We conclude that any portion of Account 6535 that would have been previously recorded in Account 675 shall be included in the numerator of the administrative component calculation and that any portion of Account 6535 that would have been recorded in Account 602:1 shall be included in the numerator of the maintenance component calculation.

18. The final point of contention between the parties concerns the inclusion of Account 6124, General purpose computers expense, in the numerator of the calculation of the administrative component. Expenses recorded in Account 6124 correspond to assets recorded in Account 2124, General purpose computers, which relate to general administrative information processing activities.⁴² Under Part 31, telephone companies recorded a portion of the expenses presently recorded in Account 6124 in Account 675. Because the Commission determined that administrative component calculations should reflect all amounts recorded in Account 675,⁴³ we believe that a portion of the expenses recorded in Account 6124 should

³⁷ *Id.*

³⁸ *Id.*

³⁹ 47 C.F.R. §32.6535; *June 22 Letter*, *supra* note 11 at 3898.

⁴⁰ *Id.* at 3898 & 3901.

⁴¹ *Pole Attachment Order*, *supra* note 34, Appendix B at 4404.

⁴² *June 22 Letter*, *supra* note 11 at 3898.

⁴³ *Pole Attachment Order*, *supra* note 34, Appendix B at 4404.

be included in the numerator of the calculation of the administrative component. We, thus, do not agree with the positions of either South Central Bell or Complainants.

19. The record does not make clear what portion of Accounts 6124, 6231 and 6535 South Central Bell would have included in pole attachment rate calculations under Part 31. To expedite resolution of the complaints, we require South Central Bell to file that information. We defer to the ALJ to resolve any issue that develops in this regard.

IV. CONCLUSION

20. Notwithstanding our findings in paragraphs 14-19 above, we believe that further proceedings are necessary to resolve questions of fact bearing on whether South Central Bell charged Complainants more than the just and reasonable rates for pole attachments since the complaints were filed in 1991. In *TCA Management Co. v. Southwestern Public Service Company*,⁴⁴ the Commission delegated authority to the Common Carrier Bureau (Bureau) to designate pole attachment complaints for hearing in appropriate circumstances. Consistent with that Order and to expedite this proceeding, we designate these complaints for a hearing before an ALJ. In taking this step, we direct the presiding ALJ to use procedures designed to encourage the parties to settle the case or narrow their differences. The ALJ may request some or all of the parties to provide any additional information deemed necessary to clarify the issues or facilitate their resolution. If the parties are unable to settle the case, the ALJ will attempt to decide this case based on the paper record. If unable to do so, the ALJ shall have discretion to conduct such further proceedings as deemed necessary and to add any issues during the hearing that will aid in resolving the complaint.

21. If the parties fail to reach a settlement, the ALJ will determine whether South Central Bell charged Complainants pole attachment rates in excess of the maximums allowable under Section 1.1409(c) of the rules.⁴⁵ If the rates are unlawful, the ALJ shall determine the refund amounts and any interest that is to be paid pursuant to Section 1.1410 of the rules.⁴⁶ To assist the ALJ in efforts to decide the case based on a paper record, we direct South Central Bell to file with the Commission the data required by Section 1.1404(g) of the rules⁴⁷ and any other data needed to calculate the maximum rates pursuant to our pole attachment formulas.

⁴⁴ FCC 95-221, PA 90-0002 (adopted June 9, 1995).

⁴⁵ 47 C.F.R. §1.1409(c).

⁴⁶ 47 C.F.R. §1.1410.

⁴⁷ 47 C.F.R. §1.1404(g).

In addition, we direct South Central Bell to analyze Accounts 6124, 6231 and 6535 to determine the expenses that were recorded in those accounts that previously would have been included in pole attachment rate calculations under Part 31. The data shall be for each of the calendar years 1991 through 1994, be supported by affidavit, and take into consideration the rulings made in this Order. South Central Bell shall also serve these data on Complainants.

22. We direct Complainants to file with the Commission the number of South Central Bell's poles to which cable fixtures were attached in each of the years 1991 through 1994 and in 1995 through the date of the Complainants' filing in response to this Order. We also direct Complainants to file with the Commission the annual pole attachment rates they have been charged by South Central Bell for the years 1991 through the date of Complainants' responsive filing. The Complainants shall support these data by affidavit and serve them on South Central Bell. The issues to be decided in the hearing are set forth below.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), & 224, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that the complaints of UACC Midwest, Inc. d/b/a United Artists Cable Mississippi Gulf Coast, Telecable Associates, Incorporated, Vicksburg Video, Inc., Mississippi Cablevision, Inc., and Mississippi Cable Television Association filed between September 10, 1991 and November 19, 1991 against South Central Bell ARE GRANTED to the extent indicated and ARE DENIED to the extent indicated in Part III of this Order, and to the extent neither granted nor denied, ARE REFERRED to an Administrative Law Judge.

24. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), & 224, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that the complaints of UACC Midwest, Inc. d/b/a United Artists Cable Mississippi Gulf Coast, Telecable Associates, Incorporated, Vicksburg Video, Inc., Mississippi Cablevision, Inc., and Mississippi Cable Television Association filed between September 10, 1991 and November 19, 1991 against South Central Bell ARE DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent order upon the following issues:

1. To determine whether South Central Bell charged Complainants pole attachment rates that exceeded the maximum amounts allowable under Commission rules during the periods covered by the complaints.

2. If South Central Bell charged Complainants excessive pole attachment rates during the periods covered by the complaints, to determine the amounts of the refunds South Central Bell must pay Complainants.

3. To determine, in view of the evidence adduced on the foregoing issues, whether Complainants are entitled to interest on any refund amounts, and, if so, the amount of that interest.

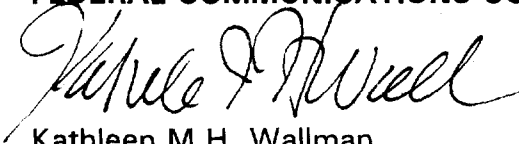
25. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence SHALL BE UPON Complainants.

26. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Commission's rules, 47 C.F.R. §1.221, within twenty (20) days of the mailing of this Order.⁴⁸

27. IT IS FURTHER ORDERED, that South Central Bell and Complainants SHALL FILE the information set forth in paragraphs 19, 21 and 22, above, within thirty (30) days of the mailing of this Order.

28. IT IS FURTHER ORDERED, that the parties SHALL ADDRESS any exceptions to the ALJ's decision in this proceeding to the Commission.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau

⁴⁸ The separated trial staff will file an appropriate Notice of Appearance before participating in the proceedings before the presiding ALJ.

ATTACHMENT A

POLE ATTACHMENT FORMULAS

Maximum Rate	=	$\frac{A \times C \times D}{B}$
Net Cost of Bare Pole	=	$\frac{E-F-G^*-(0.05 \times H)}{I}$
Net Pole Investment	=	$E-F-G^*$
Accumulated Deferred Income Taxes (Poles)	=	$\frac{E}{K} \times M^*$
Depreciation Carrying Charge	=	$O \times \frac{E}{H}$
Administrative	=	$Q + X$
Taxes	=	$S + J$
Maintenance	=	$U + W$

KEY

A =	Space Occupied by CATV; presumptively one foot
B =	Total Usable Space; presumptively 13.5 feet
C =	Net Cost of a Bare Pole
D =	$(N + P + R + T + V)$
E =	Gross Pole Investment in Part 32 Account 2411
F =	Depreciation Reserve (Poles)
G =	Accumulated Deferred Income Taxes (Poles)
H =	Net Pole Investment
I =	Number of Poles
J =	Net Plant Investment
K =	Total Gross Plant Investment
L =	Total Depreciation Reserve
M =	Total Accumulated Deferred Income Taxes*
N =	Depreciation Carrying Charge
O =	Depreciation Rate for Poles
P =	Administrative Carrying Charge
Q =	Total General and Administrative Expenses
R =	Tax Carrying Charge
S =	Total Current and Deferred Tax Expense
T =	Maintenance of Carrying Charge
U =	Pole Maintenance Expense
V =	Cost of Capital (Return) = Return Authorized by State Regulatory Commission
W =	Net Investment in Poles*
X =	Net Plant Investment*

* We are treating deferred taxes as most state commissions do - as a rate base deduction. If the state utility commission includes the reserve for deferred income taxes in the utility's capital structure at zero cost, we would not need to make any further adjustment.